American Bankers Association
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Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (released May 14, 2018), 83 Fed. Reg. 26,284 (June 6, 2018)

Dear Ms. Dortch:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the Federal Communications Commission's (Commission) Public Notice released on May 14, 2018.[2] The Public Notice seeks feedback concerning how the Commission should interpret certain provisions of the Telephone Consumer Protection Act (TCPA) in light of the March 16, 2018, decision by the U.S. Court of Appeals for the District of Columbia Circuit.[3] In its decision, the D.C. Circuit set aside two key aspects of the Commission's TCPA rules, sustained a third aspect of those rules, and reached a number of important conclusions regarding permissible interpretations of the TCPA.

In the Public Notice, the Commission also seeks comment on related TCPA issues, including the Commission's rules[4] issued in 2016 that implemented section 301 of the Bipartisan Budget Act of 2015 (Budget Act). That section exempted, from the TCPA's consent requirement, calls made regarding debt "owed to or guaranteed by the United States."[5]

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[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.
[2] Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152, 02-278 (released May 14, 2018), 83 Fed. Reg. 26,284 (June 6, 2018) [hereinafter *Public Notice*].
[3] *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).
[4] Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (released Aug. 11, 2016).
[5] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 588 (2015) [hereinafter *Budget Act*].

I. Summary of Comment

ABA welcomes the Commission's efforts to provide new interpretations of the TCPA that align with the statute's text and Congress' intent when it passed the law in 1991. The TCPA prohibits, with limited exceptions, telephone calls and text messages to cell phones using an "automatic telephone dialing system," commonly known as an "autodialer," unless the caller has the prior express consent of the "called party."[6] The statute's primary purpose is to protect consumers from intrusive and unwanted telemarketing calls. The restrictions on autodialed calls to wireless numbers were written, in part, to control the shifting of telemarketers' advertising costs to consumers by the use of random and sequential telephone number generators to run mass calling campaigns.[7] Congress did not intend for the restrictions "to be a barrier to the normal, expected or desired communications between businesses and their customers."[8]

Despite Congress' intent, the Commission's prior TCPA interpretations have in practice become a "barrier" preventing customers from receiving time-critical, non-telemarketing communications from their banks, including suspicious activity alerts, notices of address discrepancies, data security breach notifications, delinquency notifications, and loan modification outreach. The fact is that customers can receive these communications in a timely and efficient manner only through automated calling—not manual dialing by live agents.

For banks to reach their customers today, calls must increasingly be placed to mobile telephone numbers. Over 50% of U.S. households are now "wireless-only," with that percentage rising to over 70% for adults between 25 and 34 years of age.[9] Consumers who use only cell phones should have the same ability to receive important informational calls from their banks as do consumers with landlines. The TCPA's restrictions were intended to provide consumers with *choice* of contact, not isolation. However, the Commission's prior TCPA interpretations, coupled with the threat of class action liability, have discouraged banks from making these calls. Consumers are the ones most harmed when they are deprived of such critical information about their bank accounts.

The Commission should issue new interpretations that *facilitate* communication between a bank and its customers and that align with the text of the TCPA and congressional intent. In drafting the TCPA, Congress did not restrict the use of *any* efficient dialing technology; rather, Congress restricted only a specific type of dialing equipment—an "automatic telephone dialing system," which Congress limited to equipment that uses "a random or sequential number generator" to store or produce telephone numbers to be called and to dial such numbers.[10] We urge the Commission to grant the Petition for Declaratory Ruling submitted by the U.S. Chamber of

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[6] Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 *et seq.* (2012).
[7] S. Rep. No. 102-178, at 5 (1991); H.R. Rep. No. 102-317, at 6 (1991).
[8] H.R. Rep. No. 102-317, at 17.
[9] Stephen J. Blumberg & Julian V. Luke, U.S. Dep't of Health & Human Services, Ctr. for Disease Control & Prevention, Nat'l Ctr. for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2017* (2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201712.pdf (Tables 1 & 2).
[10] 47 U.S.C. § 227(a)(1).

Commerce, ABA, and 15 other groups that asks the Commission to confirm, consistent with the TCPA's text, (a) that to be an autodialer (within the meaning of the statute) the calling equipment must use a random or sequential number generator to store or produce telephone numbers and to dial those numbers without human intervention; and (b) that only calls made using such actual autodialer capabilities are subject to the TCPA's restrictions (the Chamber-led Petition).[11]

The Commission should also ensure that banks are not discouraged from placing important calls to their customers out of fear that the bank will be subject to liability for inadvertently calling a reassigned phone number—i.e., a customer number for which the bank has obtained consent to call but which has been reassigned to another person unbeknownst to the bank. We ask that the Commission interpret the statutory term "called party" to mean the "intended" or "expected" recipient of the call and to permit a bank or other business to rely on the consent it receives from its customer. While not a substitute for a new interpretation of "called party," we also support the Commission's efforts to establish a database of reassigned numbers, to provide callers with an additional, voluntary tool they may use to confirm that their customers' numbers have not been reassigned.

Banks seek to honor customers' requests to revoke consent to receive autodialed calls to their cell phones, but banks are often confronted with ambiguous expressions from customers of intent to revoke that consent. To facilitate banks' efforts to carry out customers' revocation requests accurately and efficiently, the Commission should confirm that businesses and their customers may contractually agree to use specific methods for customers to revoke their consent to receive autodialed calls. In instances where no such contract governs, the Commission should confirm, as the D.C. Circuit suggested, that a customer may revoke consent (within the meaning of the TCPA) only through "clearly-defined and easy-to-use opt-out methods" provided by the caller.[12]

In addition, the Commission should revise its rules implementing the Budget Act's exemption, from the TCPA's consent requirement, for calls made regarding debt "owed to or guaranteed by the United States"[13] (2016 Rules). The Commission should apply the exemption to all types of government obligations and remove restrictions not authorized by the Budget Act.

These reforms would not impair the Commission's critical work to eliminate illegal automated calls. We support the Commission's efforts to limit consumers' receipt of unlawful "spoofed" calls—i.e., calls in which the caller ID displays a phone number different from that of the telephone from which the call was placed with "the intent to defraud, cause harm, or wrongly obtain anything of value."[14] The Commission's decision to authorize the blocking of certain

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[11] Petition for Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278 (May 3, 2018), https://www.aba.com/Advocacy/LetterstoCongress/Documents/cl-TCPA-20180503.pdf?utm_campaign=ABA-Newsbytes-050418&utm_medium=email&utm_source=Eloqua [hereinafter *Chamber-led Petition*].
[12] *ACA Int'l*, 885 F.3d at 709.
[13] *Budget Act* § 301.
[14] Truth in Caller ID Act of 2009 § 2, 47 U.S.C. § 227(e)(1).

presumptively illegal calls demonstrates that the Commission can take action to address illegal automated calls while minimizing the risk that banks and other legitimate businesses will be harmed.[15] We look forward to continuing to work with the Commission to combat illegal calls while facilitating the ability of banks and other businesses to place valued and important informational calls to customers using 21st century communications technologies.

II. The Commission Should Facilitate Prompt and Efficient Communications from Banks to their Customers

Efficient, effective communications are essential if banks are to serve their customers and comply with their regulatory obligations.[16] Banks regularly seek to send time-critical, non-telemarketing communications to large numbers of customers promptly, including—

- Suspicious activity alerts;
- Data security breach notifications;
- Verification of a consumer's identity prior to the establishment of a new credit plan;
- Notices of address discrepancies or reminders to activate a new account; and
- Alerts to promote fee avoidance, including low balance, overdraft, and over-limit transaction alerts.

Banks also seek to place calls to distressed or delinquent mortgage, credit card, or other borrowers. These calls are consumer-protecting communications designed to establish live contact with the borrower. It is well-established that the earlier a creditor is able to communicate with a financially distressed borrower, the more likely the creditor will be able to offer the borrower a loan modification, interest rate reduction, forbearance on interest and fees during a temporary hardship or disaster, or other alternative that will help limit avoidable late fees, interest charges, negative credit reports, and, where appropriate, repossession of the collateral or foreclosure.[17] Mortgage servicing regulations, which require that servicers place calls at certain frequencies, reflect the well-established public policy goal of initiating conversations with financially distressed borrowers early in the delinquency in order to prevent foreclosure. (A summary of these regulations is attached in the Appendix.)

Many of the informational communications that banks place are time-sensitive. They require that calls be placed immediately and for only a limited duration of time.

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[15] *See* Report and Order and Further Notice of Proposed Rulemaking, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (released Nov. 17, 2017).
[16] *See* Comments of Bureau of Consumer Financial Protection, CG Dockets No. 18-152, 02-278, at 1 (June 13, 2018), https://ecfsapi.fcc.gov/file/10613092630663/BCFP%20comment%20to%20FCC%20on%20TCPA.pdf ("Consumers benefit from communications with consumer financial products providers in many contexts, including . . . notifications about their accounts").
[17] *See id.* at 2 (expressing view that a "properly circumscribed definition of [an autodialer] could be critical to fostering communications" between borrowers and creditors).

Placing informational calls through automated means provides significant advantages to both customers and the bank. Automated calling permits the bank to implement stronger compliance controls for outbound calls, including, for example, measures to avoid calls to wrong numbers. Automated calling also better facilitates adherence to regulatory requirements, such as limitations on the time of day that a call may be placed.

III. The Commission Should Issue a New Interpretation of an "Automatic Telephone Dialing System" that Is Consistent with the Text of the TCPA and Congressional Intent

A. Equipment Must Dial Numbers in Random or Sequential Order to Be an "Automatic Telephone Dialing System"

Congress passed the TCPA primarily to control the shifting of telemarketers' advertising costs to consumers by the use of random and sequential generators to run mass calling campaigns.[18] These calling campaigns also tied up emergency and public safety-related phone lines by indiscriminately calling numbers.[19] As a secondary purpose, the TCPA was intended to protect the privacy of cell phone users at a time when wireless technology was nascent.[20]

To achieve these purposes, Congress imposed restrictions on calls made from an "autodialer," which it defined as "equipment which has the capacity- (A) to store or produce telephone numbers to be called, using a *random or sequential number generator*; and (B) to dial such numbers."[21] Significantly, an autodialer uses a random or sequential algorithm to generate numbers without regard to whether all of the numbers generated have been assigned to individual consumers, emergency services, healthcare providers, or public safety agencies.

Congress' intent in defining an autodialer in this manner is clear: to restrict the use of dialing equipment that creates numbers at random or sequentially (i.e., where each number dialed follows the last one in numeric order).[22] Dialing equipment with this number-generating ability

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[18] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394 (2012) [hereinafter *TCPA*] (observing the "increased use of cost-effective telemarketing techniques"); H.R. Rep. No. 102-317, at 6 (observing that automatic dialing systems permit telemarketers to provide a message to potential customers "without incurring the normal cost of human intervention"); S. Rep. No. 102-178, at 2 (observing that the "advance of technology" has made "automated phone calls more cost-effective").

[19] *See TCPA* § 2(5) (observing that "[u]nrestricted telemarketing" can be a "risk to public safety" when "an emergency or medical assistance telephone line is seized"); H.R. Rep. No. 102-317, at 10 ("Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations").

[20] *See TCPA* § 2(5) (observing that unrestricted telemarketing can also be "an intrusive invasion of privacy").

[21] 47 U.S.C. § 227(a)(1) (emphasis added).

[22] *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/sequential (defining "sequential" as "of, relating to, or arranged in a sequence **:** SERIAL") (last visited

creates the harm that Congress sought to address, and Congress imposed restrictions on this specific equipment—not on automated dialing technology more broadly. We agree with Chairman Pai that if the device cannot perform these functions—to store or produce numbers in random order or in sequential order, and to dial such numbers—it cannot be an autodialer.[23]

Notably, Congress did *not* intend to restrict technologies that merely facilitate the efficient dialing of numbers stored in databases compiled for a specific purpose, such as lists of numbers of a business' existing customers with whom the business needs to communicate.[24] A dialing technology that calls lists of numbers is not an autodialer, because it does not meet the statutory test: the technology does not generate numbers to be called in "random or sequential" order. Consequently, a "predictive dialer," which efficiently times the dialing of a phone number with the availability of an agent, is not an autodialer. If Congress had intended to restrict predictive dialers or the dialing of numbers from lists—as opposed to restricting the dialing of numbers generated randomly or sequentially—it could easily have said so.[25]

B. The 2015 Order's Expansive Definition of an "Automatic Telephone Dialing System" Has Prevented Customers from Receiving Important Messages from their Banks

The key feature of the statutory autodialer definition—that numbers are generated without regard to their assignment to particular subscribers—excludes the types of devices that banks use to call their customers. Unlike the abusive telemarketers from which Congress intended to protect consumers, banks are interested only in calling the telephone numbers of actual customers and have no desire or incentive to dial numbers generated randomly or in sequence. As written and properly understood, the statutory definition of an autodialer does not, and should not, apply to the devices that banks use to make calls to non-random and non-sequential numbers.

June 28, 2018); S. Rep. No. 102-178, at 2 (describing harms Congress sought to address, including that "some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls").

[23] Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, 30 FCC Rcd. 7961, 8074 (2015) [hereinafter *2015 Order*] (Pai, Comm'r, dissenting) ("If a piece of equipment . . . *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—then how can it possibly meet the statutory definition? It cannot.") (emphasis in original).

[24] Modern dialing technologies improve compliance with the Fair Debt Collection Practices Act and other laws by minimizing the opportunity for human error, such as dialing wrong numbers or calling borrowers outside of permissible hours or more frequently than permitted.

[25] *See, e.g., MCI Telecommunications Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231-32 (1994) (holding that the Commission's decision to make tariff filing optional for certain carriers was not a valid exercise of its statutory authority, where Communications Act mandated filing by every carrier, because the Commission's "fundamental revision of the statute . . . was not the idea Congress enacted into law . . ."); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994) (applying the principle that, if Congress intended to impose certain requirements in statute, it would have used specific words in the statutory text).

However, the Commission's prior interpretations of the definition of an autodialer impair the ability of banks to use efficient dialing technologies to contact customers with important messages. These expansive interpretations have encouraged the filing of class action lawsuits, and the resulting risk of substantial litigation costs has led banks to limit or eliminate many communications that we believe would be welcomed by customers.

Today, banks frequently use less efficient dialing technologies solely to avoid falling within the definition of an autodialer, as interpreted by the Commission. These less efficient technologies include—

- Manually dialing all 10 digits to place a call;
- Copying, pasting, and clicking a number to initiate a call; and
- Providing two separate phone systems to certain bank personnel (one system that is connected to efficient dialing equipment, and one system that is not).

When a bank feels compelled, because of regulatory risk, to use less-efficient dialing technology to place calls, the cost—and the time—to place each call increases substantially. In certain instances, the bank may determine that it is not financially or logistically feasible to place such consumer-benefitting calls, particularly calls that must be placed immediately. For example, alerts about suspicious activity on a customer's account cannot be sent in a timely manner without the use of dialing technology. If a bank has not obtained a customer's documented consent to be called, the bank may be obstructed from sending the alert, depriving the customer of information about potentially fraudulent activity on his or her account.

Although banks diligently work to acquire customer consent, there are a number of situations in which documentation of consent may be challenged. For example, a bank may have obtained the customer's number through reliable means, such as through acquisition of the customer's account from another institution, from the customer's spouse, or from receipt of an incoming call from the customer. But the threat of litigation effectively prevents many banks from placing consumer-benefitting calls to these customers' numbers, depriving the customer of desired time-critical information.

C. The Commission Should Grant the Chamber-led Petition and Issue a New Interpretation of an Autodialer that Is Consistent with the TCPA's Text and Congressional Intent

We urge the Commission to grant the Chamber-led Petition, which proposes an interpretation of the statutory definition of an autodialer that is consistent with the text of the TCPA and congressional intent. As stated above, Congress defined an autodialer as "equipment which has the capacity- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[26] As described more fully in the Chamber-led Petition, the Commission should confirm that (a) to be an autodialer, the calling equipment must use a random or sequential number generator to store or produce telephone

[26] 47 U.S.C. § 227(a)(1).

numbers and dial those numbers without human intervention; and (b) that only calls made using actual autodialer capabilities are subject to the TCPA's restrictions.[27]

IV. The Commission Should Interpret "Called Party" to Mean the Intended or Expected Recipient of the Call, Permit a Business to Rely on Its Customer's Consent, and Establish a Database of Reassigned Numbers

In the 2015 Order, the Commission interpreted "called party" to mean the current subscriber or non-subscriber customary user of the number dialed, and provided a safe harbor from liability for the first call attempt to a reassigned number.[28] This interpretation introduces potential liability for any call, after the first attempt, placed to a number that has been reassigned from the business' customer (the intended recipient) to another consumer. As a result, banks are compelled to limit—and, in certain instances, eliminate—many communications that we believe would be helpful to customers, out of fear of incurring liability for calling a reassigned number.

To ensure better that customers receive valuable communications from their banks, we urge the Commission to interpret the statutory term "called party" to mean the "intended" or "expected" recipient of the call, and to permit a caller to rely on the prior express consent it received from its customer or customary user of the number dialed. Banks have every incentive to reach their customer—and not another consumer—when placing a call. A suspicious activity alert, data breach notification, or other informational message is specific to the customer's account; it provides no value to the bank or to the customer if sent to a number that has been reassigned. Moreover, under many circumstances, the bank is liable for losses resulting from a customer's inaction when confronted with suspicious activity on the account; the bank has a strong incentive to reach its customer and no interest in contacting another individual.

An interpretation of "called party" to mean the "intended" or "expected" recipient is the only way to interpret the TCPA's statutory text that is consistent with Congress' intent. If "called party" is interpreted instead to mean "current subscriber" (or "non-subscriber customary user"), the TCPA's consent requirement becomes largely meaningless.

Currently, there is no way for a bank to know with certainty that a customer's number remains with that customer and has not been reassigned. Consequently, any autodialed call may expose the business to liability and—where the regulatory risk in placing a call outweighs the benefit provided by the call—lead the bank not to place the call. This can deprive customers of important account-related information solely because of the regulatory risk in placing the call.

We also support the Commission's efforts to establish a database of reassigned numbers (Reassigned Numbers Database). A Reassigned Numbers Database is not a substitute for a new interpretation of "called party." Nonetheless, as described more fully in ABA's comment letters

[27] *See Chamber-led Petition*, *supra* note 11, at ii-iii.
[28] *2015 Order*, 30 FCC Rcd. at 8001 & 8006-09.

of June 7, 2018,[29] and September 26, 2017,[30] if a Database were established that reports timely, accurate, and comprehensive information on disconnected and reassigned numbers, it could provide significant value to banks and, more importantly, to those customers who currently may be in jeopardy of not receiving important communications from their banks because of the regulatory risk of calling a customer number that has been reassigned.

V. The Commission Should Confirm that Parties May Contract to Use Specific Revocation Methods and, for Parties not Bound by Contract, Confirm that a Customer May Revoke Consent Only Through "Clearly-Defined and Easy-to-Use Opt-Out Methods" Provided by the Caller

ABA members respect and carry out customer requests to opt out of receiving autodialed calls. However, the 2015 Order's holding that a consumer may revoke consent to receive autodialed calls through "any reasonable means"[31]—without clarifying which means are "reasonable"—harms consumers by preventing banks from designating certain communications channels where consumers' revocations could be efficiently and accurately processed. Consistent with the D.C. Circuit's opinion, we urge the Commission to clarify that a bank and its customer may contractually agree to use specific methods for the customer to revoke his or her consent to receive autodialed calls. In instances where there is no contractual provision, we ask the Commission to confirm, as the court suggested, that a customer may revoke consent (within the meaning of the TCPA) only through "clearly-defined and easy-to-use opt-out methods" provided by the bank or other business.[32] We urge the Commission not to prescribe particular revocation methods; such prescribed methods are not adaptable to technological change.

The broad and ambiguous revocation right established by the 2015 Order makes it very difficult for a caller to ensure that its customers' intentions are understood and carried out. ABA members report that many customers' expressions of possible revocation often fail to express clearly the customer's intent to revoke consent. Moreover, it is often unclear whether a customer wants to revoke consent to receive all calls, to revoke consent to receive a certain type of call, or to revoke consent to receive calls relating to a certain account with the bank.

ABA members report that some plaintiffs' attorneys seek to take advantage of the existing revocation right to generate TCPA lawsuits. For example, plaintiffs' firms will send, on behalf of clients, revocation requests by mail to a bank office (or post office box) that is not listed as an

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[29] Letter from Jonathan Thessin, Am. Bankers Ass'n, to Marlene H. Dortch, Sec., Fed. Commc'ns Comm'n (June 7, 2018), https://www.aba.com/Advocacy/commentletters/Documents/cl-FCC-Robocalls-Sept2017.pdf.

[30] Letter from Jonathan Thessin, Am. Bankers Ass'n, to Marlene H. Dortch, Sec., Fed. Commc'ns Comm'n (Sept. 26, 2017), https://www.aba.com/Advocacy/commentletters/Documents/cl-Robocalls20180607.pdf?utm_campaign=ABA-Newsbytes-060818&utm_medium=email&utm_source=Eloqua.

[31] *2015 Order*, 30 FCC Rcd. at 7993.

[32] *ACA Int'l*, 885 F.3d at 709.

address to which customers should send correspondence, or will coach clients to send a lengthy letter to the client's bank with a short statement of revocation buried in the middle of the letter. The firms will then file suit on the basis of calls placed by the bank to their clients before the bank has received and processed the client's revocation request.

The risk of a TCPA claim has led banks to interpret *any* statement by a customer of potential revocation, however ambiguous, as a request to revoke consent to receive *all* autodialed calls. For example, one ABA member reported that it will process each of the following customer statements as a request to revoke consent to receive all autodialed calls: "can't talk"; "don't call"; "I'm sick, don't call"; and "I'm busy, don't call." Consequently, a customer may be deprived of important informational calls related, for example, to a data breach or to suspicious activity on an account because of an ambiguous expression of revocation made in the context of another call. Instead, the customer might receive the notification by mail or e-mail, both of which are at risk of not being opened. This result frustrates banks and their customers and may expose both to unauthorized account access.

In order to provide for the accurate and efficient processing of customer revocations, the Commission should clarify that a business and its customer may contractually agree to specific methods by which the customer may revoke consent to receive autodialed calls. The D.C. Circuit observed that the 2015 Order did not address "parties' ability to agree upon revocation procedures" under the TCPA.[33] Permitting parties to determine revocation methods through contract would ensure that banks and other businesses could establish convenient and clearly defined methods by which customers can express revocation, and that customers' revocation requests are made to bank personnel specifically trained to receive and process the revocation.[34]

For occasions where the parties have not contractually agreed upon permissible revocation methods, we urge the Commission to follow the D.C. Circuit's suggestion and confirm that a customer may revoke consent (within the meaning of the TCPA) only through a "clearly-defined and easy-to-use opt-out method[]" provided by the business.[35] An attempt to revoke consent outside of these methods should be *per se* unreasonable. As the D.C. Circuit concluded, "[i]f recipients are afforded such options, any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable."[36] As discussed above, banks and other businesses can best ensure customers' revocation requests are accurately understood and efficiently processed if the requests are submitted using methods established by the business. For example, revocation methods can be established that distinguish a request to revoke consent to receive *all* autodialed calls, a request to revoke consent to receive *certain types* of autodialed calls, or a request to receive autodialed calls regarding *certain accounts*.

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[33] *ACA Int'l*, 885 F.3d at 710; *see also Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2nd Cir. 2017) (holding that "the TCPA does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained-for exchange").
[34] *See ACA Int'l*, 885 F.3d at 709 (concluding that callers "have no need to train every retail employee" on how to process a revocation of consent under the TCPA).
[35] *Id.*
[36] *Id.* at 710.

We urge the Commission not to prescribe specific revocation methods that a bank must offer, and a customer must use, to revoke consent. A specifically prescribed revocation method, such as pushing *7, would "lock" all callers into offering that method, even if changes in technology made alternate methods for customers to revoke consent preferable to both callers and customers. Businesses are best positioned to use available technology to design efficient and effective methods for customers to revoke consent.

We also ask that the Commission provide callers with a sufficient amount of time to process a customer's revocation of consent before the caller is liable for calls placed to that customer. We recommend that the Commission adopt a safe harbor similar to that provided to callers who place a call to a wireless number that has been ported from a landline number; under that safe harbor, businesses are not liable for calls to mobile numbers that were ported within the past 15 days.[37]

VI. The Commission Should Revise its 2016 Rules to Apply the Exemption to All Types of Government Obligations and Remove Restrictions on Exempted Calls not Authorized by the Bipartisan Budget Act of 2015

The Public Notice requests comment on the petition for reconsideration filed by Great Lakes Higher Education Corporation (Great Lakes).[38] Great Lakes' petition requests that the Commission reconsider its rules issued in 2016 (2016 Rules) that implemented Congress' exemption, from the TCPA's consent requirements, for calls made regarding debt "owed to or guaranteed by the United States"[39] (Federal Debt Exemption). We agree that the Commission should reconsider and revise the 2016 Rules. Those Rules imposed limitations on the Federal Debt Exemption, limitations that are not authorized by the text of the 2015 Budget Act legislation, that would significantly hinder the ability of mortgage and Federal student loan servicers to provide loss mitigation and assist delinquent borrowers, and that are inconsistent with the rules and standards of other agencies.

The statutory language in the Federal Debt Exemption does not restrict the types of debt "owed to or guaranteed by the United States" to which the Exemption applies. As discussed more fully in ABA's 2016 letter commenting on the Commission's proposal to implement the Exemption,[40] the Commission should interpret the Exemption to include all loans or other debt (1) insured, guaranteed, coinsured, or reinsured, in whole or in part, by the U.S. government or any agency or instrumentality thereof, directly or indirectly; or (2) as to which the U.S. government or any agency or instrumentality thereof may become obligated, directly or indirectly, to reimburse a third party for all or part of a default or loss claim arising thereunder or relating thereto.

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[37] *See* Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, ¶ 7 (released Sept. 21, 2004).
[38] *Public Notice* at 5.
[39] *Budget Act* § 301.
[40] *See* Letter from Jonathan Thessin, Am. Bankers Ass'n, & Kate Larson, Consumer Bankers Ass'n, to Marlene H. Dortch, Sec., Fed. Commc'ns Comm'n (June 6, 2016), http://www.aba.com/Advocacy/commentletters/Documents/cl-TCPA2016June.pdf.

The Commission should explicitly recognize that calls made regarding loans owed to or guaranteed by Fannie Mae and Freddie Mac (the Enterprises) are encompassed by the Federal Debt Exemption. Fannie Mae and Freddie Mac loans are debt "owed to or guaranteed by the United States" because the Enterprises were chartered by Congress[41] and have been placed in conservatorship by the Federal Housing Finance Agency, which has authority to control the assets and operations of the firms and clears all major decisions. Since the Department of the Treasury entered into Senior Preferred Stock Purchase Agreements with the Enterprises, the U.S. Government has effectively controlled Fannie Mae and Freddie Mac and has *de facto* guaranteed payment on their debt and MBS. As a result, the loans they make are owed to or guaranteed by the U.S. government, and calls regarding those loans fall within the Federal Debt Exemption.

We also ask that the Commission remove two limitations in the 2016 Rules that were not authorized by the Budget Act. First, the Commission should remove the limitation that permits a caller to place exempted calls only to a number provided by the borrower to the caller. The Budget Act delineated the types of conditions the Commission could impose on the Federal Debt Exemption: it gave the Commission the authority only to "restrict or limit the number and duration of calls" made to a wireless number to collect on a debt owed to or guaranteed by the United States.[42] The Budget Act did not limit the Exemption to calls made to numbers that were provided to the lender by the borrower, nor did the Act authorize the Commission to impose such a restriction. This restriction does not concern the number or duration of exempted calls; instead it concerns how the lender *obtained* the phone number to which an exempted call is directed. As such, the limitation is not allowable under the Act.

Second, the Commission should confirm that the Exemption applies to calls made to reassigned numbers. Limiting the Exemption for calls made to reassigned numbers is not a restriction concerning the number or duration of exempted calls. Consequently, the proposed limitation is not permissible under the Act. Congress clearly determined that the benefit of making the calls exempted by the Budget Act outweighs the minimal inconvenience of individuals mistakenly dialed. Moreover, the safe harbor for the first call attempt made to a reassigned number is arbitrary for the same reasons that the D.C. Circuit set aside the analogous safe harbor for non-exempted calls in *ACA International v. FCC*.[43]

VII. Conclusion

ABA welcomes the Commission's initiative to seek public comment on how it should interpret the TCPA in light of the D.C. Circuit's March 16, 2018, decision, which set aside two key aspects of the Commission's TCPA rules. Congress did not intend for the TCPA to impede normal, expected, or desired communications between businesses and their customers, but the Commission's prior interpretations have impermissibly expanded the TCPA's reach to

[41] *See* 12 U.S.C. § 1716 *et seq.* (2012) (establishing Fannie Mae); 12 U.S.C. § 1451 *et seq.* (2012) (establishing Freddie Mac).
[42] *Budget Act* § 301(a)(2).
[43] *See ACA Int'l*, 885 F.3d at 706-09.

encompass calls beyond those Congress restricted. As a result, customers have been deprived of valued and important informational calls from their banks.

The Commission has an opportunity to issue new TCPA interpretations that are consistent with the text of the statute and congressional intent, and that facilitate the ability of banks and other businesses to use modern technologies to communicate with their customers effectively and efficiently. The Commission can advance these reforms without impairing its important work to combat illegal automated calls. We look forward to continuing to work with the Commission to achieve these results.

Sincerely,

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance

APPENDIX

Mortgage Servicing Requirements

The mortgage servicing rules of federal agencies *require* financial institutions to contact distressed borrowers. Below is a summary of these rules.

- **Bureau's Mortgage Servicing Rules:** Servicers must make a "good faith effort" to establish "live contact" with delinquent borrowers not later than the 36th day of the delinquency (and again not later than 36 days after each payment due date so long as the borrower remains delinquent), which often requires four or more initiated calls.

- **Federal Housing Administration:** Beginning on the 17th-20th day of delinquency, servicers must call delinquent borrowers a minimum of two times per week (and should vary the times and days of the week of call attempts), until contact is established or the servicer determines that the mortgaged property is vacant or abandoned.

- **Department of Veterans Affairs:** Servicers must make an effort to establish live contact with a borrower, provide financial counseling, and assess potential alternatives for relief. These efforts often require that a number of calls be initiated.

- **Home Affordable Modification Program (HAMP):** Servicers must make a minimum of four telephone calls to delinquent borrowers who are potentially eligible for HAMP at the borrower's last known phone number of record (at different times of the day) over a period of at least 30 calendar days.

- **National Mortgage Settlement:** The National Settlement adopted HAMP's requirement that servicers place a minimum of four calls over a 30-day period.

- **Fannie Mae and Freddie Mac Servicing Requirements:** Starting not later than the 36th day of delinquency, servicers must attempt to make personal contact with a delinquent borrower at least every fifth day at varying days of the week and times of the day.

- **Office of the Comptroller of the Currency (OCC) Consent Agreements:** The OCC approved bank compliance plans that included procedures for telephoning delinquent borrowers to inform them about loss mitigation options.